STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CALVIN DWIGHT WARE,

Defendant-Appellant.

FOR PUBLICATION
March 10, 2005

No. 251048
Wayne Circuit Court
LC No. 03-003368-01

Before: Schuette, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a). He was sentenced to life in prison. He appeals as of right. We affirm.

I. FACTS

Defendant gave a statement to police, that on August 18, 2002, defendant entered a house on Melrose Street where the victim was located. Defendant approached the victim and questioned him regarding drug money he owed to defendant's boss. After defendant determined that the victim was approximately $250 short, defendant picked up a table leg lying next to the door and struck the victim in the head. The victim fell to the floor and remained unconscious.

Present during the attack was Constance Harrell. On December 4, 2002, Harrell gave a statement to Officer Kurtiss Staples, denying any knowledge of the murder. Later that same day, James Fisher, an investigating officer, took another statement from Harrell, describing the event on August 18, 2002. In the subsequent statement, Harrell stated that defendant, after hitting the deceased in the head, and before leaving the house, threatened the remaining people in the house by saying, "I know everybody in this house right now . . . [i]f this shit go any further y'all next ." Fisher described Harrell as trembling with fear and sincerely afraid for her life. During trial, and despite a court order, Harrell refused to appear before the court. During trial, the court first allowed Officer Staples to take the stand and read Harrell's statement onto the record. Investigator Fisher then took the stand and read Harrell's subsequent statement onto the record.

II. MRE 804(b)(6)

Defendant's first issue on appeal is that the trial court abused its discretion when it admitted unsigned, unsworn statements of a non-testifying witness as evidence under MRE 804(b)(6). We disagree.

A. Standard of Review

When reviewing a trial court's decision to admit evidence under a hearsay exception, this Court reviews for an abuse of discretion. An abuse of discretion exists if an unprejudiced person would find no justification for the ruling made. A trial court's decision on a close evidentiary question does not amount to an abuse of discretion. *People v Geno*, 261 Mich App 624, 631-632; 683 NW2d 687 (2004). When the decision involves a preliminary question of law, such as whether a rule of evidence, statute, or constitutional provision precludes the admission of evidence, a de novo standard of review is used. Therefore, when such preliminary questions are at issue, this Court will find an abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

B. Analysis

Hearsay is defined as a statement, other than one made by the declarant while testifying at a trial or hearing, which is offered in evidence to prove the truth of the matter asserted. *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997); MRE 801(C). Hearsay is generally not admissible as substantive evidence. *Id.*; MRE 802. Here, the statements in question were given by Constance Harrell who did not testify at trial. The statements were being offered to prove the truth of the matter asserted, that defendant murdered decedent with premeditation and that the act was not in self-defense. Thus, the statements are hearsay.

When the prosecution moved to have Harrell's statements admitted into evidence, despite the fact that she did not testify at trial, the trial judge allowed the statements in under MRE 804(b)(6). MRE 804(b)(6) states that "a statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness" will not be excluded by the hearsay rule. MRE 804(b)(6). . Here, defendant threatened individuals who witnessed him kill decedent. After hitting decedent with a table leg, defendant said, "if it gets out I know who to go to," and "I know everybody in this house right now . . . [i]f this shit go any further y'all next." Officer Staples and Investigator Fisher both stated that Harrell appeared scared when she talked to them and that she repeatedly stated that she did not want to testify because she was fearful for her life. Harrell was subpoenaed and did not show up to testify at trial. Given this evidence (that defendant made threats, the resulting fear that was stricken into Harrell, and the fact that Harrell did not testify), the trial judge could conclude, by a preponderance of the evidence, that defendant engaged in wrongdoing that was intended to, and did, procure the unavailability of Harrell as a witness.

Furthermore, the United States Supreme Court in *Crawford v Washington*, 541 US 36, (2004) sought to reinforce the criminal defendant's Sixth Amendment right to confront a witness offered against him. *Crawford* is absent of language concerning the circumstances of a witness's unavailability, when such unavailability was caused by the defendant. From a practical standpoint, it would be grossly unfair to allow a defendant in a criminal matter to cause an adverse witness to be unavailable, and then assert a Sixth Amendment violation arguing a *Crawford*-type violation. To allow otherwise would facilitate threats or acts by a criminal

defendant, against a potential witness, in order to prohibit statements or testimony, and thereby grant a criminal defendant a "constitutional defense" against all statements made by a witness who was unavailable at the time of trial.

III. JURY INSTRUCTION

Defendant's second issue on appeal is that the trial court erred when it denied defendant's request to instruct the jury on assault with intent to do great bodily harm less than murder. We disagree.

A. Standard of Review

When reviewing a claim of instructional error, this Court reviews de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). The issue of whether an offense is a lesser included offense is a question of law, which will be reviewed by this Court de novo. *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003).

B. Analysis

The Michigan Supreme Court, in *People v Cornell*, 466 Mich 335, 359; 646 NW2d 127 (2002), held that MCL 768.32(1)[1] does not permit jury instructions on cognate lesser offenses, but does permit instructions on necessarily included offenses if they are supported by a rational view of the evidence. *Id.* at 359. "[C]ognate lesser included offenses are related and hence cognate in the sense that they share several elements, and are of the same class or category, but may contain some elements not found in the higher offense." *People v Lemons*, 454 Mich 234, 253; 562 NW2d 447 (1997). Necessarily included offenses are offenses whose elements you would have to prove in order to prove the principal offense. *Mendoza, supra* at 541.

The crime of assault with intent to do great bodily harm less than murder presupposes that the defendant's act has not caused the death of the victim. If the victim has died and the defendant's admitted act constituted a legally cognizable cause of the death, jury instructions on offenses not intended to punish acts causing death are precluded. If there is uncontested evidence that decedent's death was caused by the defendant's acts, the court may not instruct on merely assaultive offenses. For an instruction on an assaultive offense to be appropriate, there must have been an independent, intervening cause of death. *People v Bailey*, 451 Mich 657, 671-672; 549 NW2d 325 (1996). In the instant case, the stipulated forensic pathology expert has stated that decedent's death was caused by blunt-force trauma to the head that was caused by enormous velocity striking the head. Therefore, pursuant to *Bailey, supra*, the court should not have instructed the jury on assault with intent to do great bodily harm less than murder, because there was no intervening cause of death, and thus, it did not err in refusing to do so.

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[1] The statute reads as follows: "Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense." MCL 768.32(1).

IV. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant's third issue on appeal is that defendant was denied his constitutional right to effective assistance of counsel when counsel failed to produce three witnesses that defendant had told him about. We disagree.

A. Standard of Review

When reviewing a claim of ineffective assistance of counsel, when an evidentiary hearing is not previously held, this Court's review is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

B. Analysis

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that counsel's performance was below an objective standard of reasonableness, defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *Id*. at 302. Counsel's failure to call witnesses is presumed to be trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997).

Defendant argued that trial counsel was ineffective for failing to produce Ezell Robinson, Jr., Deandra Williams and Vincent Delks to testify. The record establishes that Robinson and Williams were present when the incident occurred, that Williams and Delks were present at a later time when Staples went to investigate the house, and that Williams and Delks were taken to the police station to be questioned. However, the record does not establish if Robinson, Williams and Delks were subpoenaed to testify, if efforts were made to get them to testify, if they had anything of worth to testify to, or that it was not sound trial strategy to not have them testify. Since this Court's review is limited to the existing record, *Rodriguez, supra* at 38, and since the record does not provide any evidence to rebut the presumption that counsel's failure to produce the witnesses was sound trial strategy, defendant's claim of ineffective assistance of counsel must fail. *Mitchell, supra* at 163.

V. SUFFICIENCY OF THE EVIDENCE

Defendant's final issue on appeal is that there was insufficient evidence presented to prove defendant guilty of first-degree premeditated murder beyond a reasonable doubt. We disagree.

A. Standard of Review

When reviewing a claim that the evidence was insufficient to support defendant's conviction, this Court reviews the evidence presented in a light most favorable to the prosecution and determines whether a rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

B. Analysis

The elements of first-degree premeditated murder are: (1) that the defendant killed the victim, and (2) that the killing was willful, deliberate, and premeditated. *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993).

Here, defendant said that he hit decedent and then grabbed a stick and hit decedent in the head with it. Harrell said that defendant grabbed a table leg and hit decedent on the head with it. Stipulated forensic pathology expert Pietak said that decedent died from blunt-force trauma to the skull, which would be caused by enormous velocity striking the head. Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could find beyond a reasonable doubt that defendant killed decedent. This element is also established by the fact that Harrell said that defendant killed decedent, and that she stated that defendant said that he killed decedent because he was short on money. Furthermore, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have concluded that defendant's actions were not in self-defense because a knife was not recovered at the scene, Harrell stated that decedent never attacked defendant, and that after defendant's conversation with decedent, defendant went and grabbed a table leg and then proceeded to hit decedent on the head with it.

Defendant argues that he did not intend to kill decedent. However, since it is difficult to ascertain a defendant's state of mind, minimal circumstantial evidence is sufficient to establish a defendant's state of mind. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Here, the jury found that the killing was willful, deliberate, and premeditated. There was evidence that defendant grabbed a table leg and struck decedent with enormous velocity, and that defendant was told by his boss to "kick [decedent's] ass," and defendant later went back to the residence to brag about what he had done. Viewing this evidence in a light most favorable to the prosecution, there was sufficient circumstantial evidence to allow the jury to infer that the killing was willful, deliberate, and premeditated. Therefore, viewing the evidence in a light most favorable to the prosecution, this Court concludes that sufficient evidence was provided to allow a rational trier of fact to conclude that the elements of first-degree premeditated murder were met.

Affirmed.

/s/ Bill Schuette
/s/ Peter D. O'Connell

I concur in result only.

/s/ David H. Sawyer